

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai**

**Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.4978/Mum/2017
(Assessment Year: 2010-11)**

M/s Trio Packaging
Bldg. No. 1,C-9, Singh Indus.Eestate
Ram Mandir Road,Goregaon (West), Vs.
Mumbai- 400061

ACIT-24(3)/30(3)
Mumbai.

PAN – AACFT1632K

(Appellant)

(Respondent)

Appellant by: Shri Anil Thakkar, A.R

Respondent by: Shri Ritesh Misra, D.R

Date of Hearing: 11.09.2019

Date of Pronouncement: 18.09.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-41, Mumbai, dated 09.05.2017, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act') for A.Y. 2010-11 on 26.06.2013. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. The Ld. CIT(A) is erred in confirming levying penalty u/s 271(1)(c) of Rs.16,20,868/-.
2. Your honour is thus, requested to delete the penalty levied u/s 271(1)(c).
3. The appellant craves to add, alter amend or delete the above ground/s of appeal.”

2. Briefly stated, the assessee firm which is engaged in the business of manufacturing of corrugated boxes, printing labels and pamphlets had filed its return of income for A.Y. 2010-11 on 10.03.2011, declaring total loss of Rs.40,23,957/-. The return of income filed by the

assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2).

3. On the basis of AIR information, it was observed by the A.O that the assessee during the year had sold a property for a consideration of Rs.1,33,68,840/- on 12.11.2009. However, it was noticed by him that the assessee had not offered any 'capital gain' in respect of the aforesaid sale transaction in its return of income for the year under consideration. Accordingly, the A.O directed the assessee to furnish the details pertaining to the sale of the property along with the 'capital gains' arising there from. As per the details furnished by the assessee, it was noticed by the A.O that the assessee during the year had sold a 'Gala' on 12.11.2009 for a consideration of Rs. 90,00,786/-, which however was not reflected in its return of income for the year under consideration. It was gathered by the A.O that the gala sold was a depreciable asset of the assessee. In the backdrop of the aforesaid facts, the A.O called upon the assessee to explain as to why the 'Short Term Capital Gain' (for short 'STCG') on the sale of the aforesaid gala may not be brought to tax. Also, the assessee was directed to furnish the computation of the STCG on the sale of the aforesaid property. In reply, the assessee submitted that the W.D.V of the gala was Rs.81,23,314/- and the same was sold on 12.11.2009 for a consideration of Rs.90,00,786/-. Accordingly, in the backdrop of the aforesaid facts the STCG on the sale of the aforesaid property was worked out at Rs.8,77,472/-. As was discernible from a perusal of the 'sale deed', it was observed by the A.O that the 'market value' of the gala as on the date of its sale by the assessee was Rs.1,33,68,840/-. Accordingly, the A.O invoking the deeming provisions of Sec.50C of the Act, therein adopted the 'segment value' of the aforesaid property as its deemed sale consideration and worked out the STCG in the hands of the assessee at Rs.52,45,526/-. As such, on the basis of his aforesaid deliberations the income of the assessee was assessed at Rs.12,21,570/- by the A.O, vide his order passed under Sec.143(3), dated nil. The aforesaid addition made by the A.O was not carried any further in appeal by the assessee.

4. After the culmination of the assessment proceedings, the A.O called upon the assessee to explain as to why penalty under Sec.271(1)(c) may not be imposed on it in respect of the suppressed STCG of Rs.52,45,526/- pertaining to the sale of the gala. As the reply filed by the

assessee did not find favour with the A.O, therefore, he imposed penalty under Sec. 271(1)(c) of Rs.16,20,868/- for concealment of the particulars of income by the assessee.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the penalty imposed by the A.O under Sec.271(1)(c) and dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee took us through the facts of the case. It was submitted by the Id. A.R, that the assessee firm as on 01.04.2009 had two industrial galas under the same 'block of asses' viz. (i) Singh Industrial Block with W.D.V of Rs.18,24,210/-; and (ii) Sadhana Industrial Estate with WDV of Rs.1,01,39,892/- (the gala which was sold during the year). It was submitted by the Id. A.R that the aforesaid gala viz. Sadhana Industrial Estate was sold during the year i.e on 12.11.2009 for a consideration of Rs.90,00,786/-. It was averred by the Id. A.R that as the sale of the aforesaid gala was neither witnessed by any cessation of the 'block of asset', nor the full value of consideration received on the sale of the said gala exceeded the aggregate WDV of the aforesaid 'block of assets', therefore, no STCG on the sale of the same did arise. It was the claim of the Id. A.R that though the assessee was duly justified in not accounting any STCG on the sale of the aforesaid gala as per the mandate of Sec.50 of the Act, however, on account of the failure on the part of its counsel who had appeared in the course of the proceedings before the lower authorities to substantiate his claim, the assessee had been made to suffer a tax liability, despite the fact that there was no such obligation cast upon it as per the mandate of law. In sum and substance, it was the claim of the Id. A.R, that it was but for the failure on the part of the assesses counsel who had appeared in the course of the proceedings before the lower authorities to appreciate the law, that the assessee had been saddled with a tax liability which otherwise was not called for in its hands. It was submitted by the Id. A.R that as the penalty proceedings are separate and distinct from the assessment proceedings, therefore, no penalty under Sec. 271(1)(c) in the backdrop of the aforesaid factual position was liable to be imposed in the hands of the assessee. Alternatively, it was submitted by the Id. A.R that no penalty under Sec. 271(1)(c) could be imposed where the 'capital gain' had been worked out by applying the deeming provisions of Sec.50C of the Act. In order to drive home his aforesaid

contention, the Id. A.R relied on the order of the Hon'ble High Court of Calcutta in the case of CIT, Kolkata-IV Vs. Madan Theatres Ltd. (G.A.No. 684 of 2013, dated 14.05.2013).

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R, that as the assessee by not disclosing the sale transaction of gala in its return of income for the year under consideration, had thus concealed the STCG arising there from, therefore, the A.O had rightly subjected the assessee to the penalty u/s Sec. 271(1)(c) of the Act. It was submitted by the Id. D.R, that the CIT(A) after duly appreciating the facts of the case had rightly sustained the penalty imposed by the A.O under Sec. 271(1)(c). Accordingly, it was submitted by the Id. D.R that as the appeal filed by the assessee was devoid and bereft of any merit, therefore, the same did not merit acceptance and was liable to be dismissed.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. Admittedly, the assessee during the year under consideration had sold a gala viz. Sadhana Industrial Estate, for a consideration of Rs.90,00,786/-. Also, there is no dispute on the fact that the 'segment rate' of the aforesaid property on the date of the sale transaction was Rs.1,33,68,840/-. It is also a fact borne from the records, that the assessee had not disclosed the aforesaid sale transaction in its return of income for the year under consideration and not accounted for any 'capital gain' arising there from. As is discernible from the orders of the lower authorities, the A.O had after adopting the 'segment value' of Rs. 1,33,68,840/- of the aforesaid gala as the deemed sale consideration, had thereafter reduced from the same the W.D.V of the said property amounting to Rs.81,23,314/- and worked out the STCG of Rs.52,45,526/- in the hands of the assessee. Again, it is a matter of fact, that the assessee had accepted the aforesaid order of the A.O and had not carried the same any further in appeal before the CIT(A).

9. We find that it was only after penalty under Sec. 271(1)(c) of Rs.16,20,868/- was imposed by the A.O, that the assessee in the course of the appeal against the said order before the CIT(A), had for the very first time raised a new line of argument while assailing the validity of the penalty imposed on it under the aforesaid statutory provision. As observed by us hereinabove, it was submitted by the assessee for the very first time before the CIT(A) that as

on 01.04.2009 it owned two industrial galas under the same 'block of assets' viz. (i) Singh Industrial Block (WDV of Rs.18,24,210/-); and (ii) Sadhana Industrial Estate (WDV of Rs.1,01,39,892/-). It was the claim of the assessee, that as one of the gala viz. Sadhana Industrial Estate was sold on 12.11.2009 for a consideration of Rs.90,00,786/- i.e at a loss of Rs.11,39,106/- (as its WDV as on 01.04.2009 was Rs.1,01,39,892/-) ,therefore, the 'block of assets' of the gala as on 31.03.2010 remained at Rs.29,63,316/- [Rs.18,24,210/- (+) Rs.11,39,106/-]. In sum and substance, it is the claim of the assessee that as neither the 'block of asset' of the gala had ceased to exist during the year under consideration, nor the full value of consideration received or accruing as a result of transfer of the aforesaid gala exceeded the modified actual cost of the assets falling within the said block of assets, therefore, no STCG on the sale of the said gala viz. Sadhana Industrial Estate did arise in the hands of the assessee as per the mandate of Sec.50 of the Act.

10. We have given a thoughtful consideration to the aforesaid contention of the Id. A.R and find that the aforesaid new line of argument which was for the very first time raised by the assessee while assailing the penalty imposed u/s 271(1)(c) before the CIT(A), was however rejected by the appellate authority for the reason that the said claim of the assessee was not discernible from the facts available on record. In fact, the CIT(A) had categorically observed that the assessee had failed to file the 'balance sheet' or the schedule of 'fixed the assets' to support its aforesaid claim. Accordingly, the CIT(A) declined to summarily accept the aforesaid unsubstantiated claim of the assessee and upheld the penalty imposed by the A.O u/s 271(1)(c) of the Act. We find that even before us the Id. A.R had adopted a similar approach and except for reiterating his aforesaid claim, had however, failed to place on record the requisite material which would irrefutably support the factual position so claimed by him. Admittedly, we are principally in agreement with the claim of the Id. A.R and are persuaded to subscribe to his claim that in the backdrop of the aforesaid facts as had been canvassed by him before us, no STCG would arise in the hands of the assessee under Sec. 50 of the Act. However, we cannot remain oblivious of the fact that the said claim of the assessee which is bereft of any supporting documentary evidence that would substantiate the veracity of its aforesaid claim, cannot be summarily accepted on the very face of it. We thus, in all fairness, are of the considered view that the matter requires to be revisited by the A.O. In case the aforesaid factual position as had been demonstrated by the assessee before us is found to be

in order, then the penalty imposed by the A.O under Sec. 271(1)(c) shall stand vacated. We thus in terms of our aforesaid observations for the aforesaid limited purpose restore the matter to the file of the A.O for fresh adjudication.

11. The appeal of the assessee is allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 18.09.2019

Sd/-
(M.Balaganesh)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 18.09.2019
PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai